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No. 99-1178

Supreme Court, U.S.
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In the
Supreme Court of the ~~United States~~

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, RANDY PETERSON, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), Randy Peterson, and California Cattlemen's Association respectfully submit this brief amicus curiae in support of the Petitioners.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. These consent letters have been lodged with the Clerk of this Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the Commerce Clause and administrative agency power. For example, PLF participated as amicus curiae before this Court in *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Jones v. United States*, 120 S. Ct. 1904 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995). PLF filed a brief amicus curiae supporting the Petitioner's Petition for Writ of Certiorari in this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Petitioner by further elucidating the inherent limitations on Congress' Article I authority under the Constitution, and by providing additional background on the regulatory scheme under which the Respondent federal agency is operating. PLF believes its public policy perspective and litigation experience will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in evaluating the merits of this case.

Amicus Randy Peterson owns land in West Valley City, Utah, a suburb of Salt Lake City. Although there is no surface water evident on the land, the Army Corps of Engineers asserted that the lands were "wetlands," basing their determination upon the saturation of soil below the surface for a period of 12% of the growing season, which, in this Utah location, amounts to roughly 2-3 weeks of the year. The Corps asserted jurisdiction based upon the migratory bird rule.

Mr. Peterson has asked the Corps how it made its jurisdictional determination, pointing out that any "wetlands" on his property were isolated and, therefore, not subject to the Corps' jurisdiction under *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Rather than explain the basis of the Corps' jurisdiction, a Corps supervisor responded by warning him that they would take legal action if he attempted to proceed with development plans without applying for a permit.

Mr. Peterson is disturbed by and opposed to the Corps' ability to exercise land use control over his property through the mere assertion of jurisdiction. He supports the Petitioners in the hope that this Court will provide much needed clarification on the scope of the Corps' authority under the Clean Water Act. Mr. Peterson believes his experience, as reflective of the experience of many landowners across the nation, will provide this Court with a viewpoint not represented by the parties to this litigation.

Amicus California Cattlemen's Association is a nonprofit corporation that was founded in 1917 to represent California's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres and contributed $1.5 billion to the state's $19.7 billion agriculture economy as recently as 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California alone.

The California Cattlemen's Association's members conduct their ranching operations on land that can include swales, ditches, vernal pools, and man-made stock ponds and watering holes. Due to California's geology, ranching land in California's central valley is often covered with "hardpan," that is, clay soils in which rainwater does not percolate through the ground, but instead stands until it evaporates. As a result, these ponds and pools are isolated; they have no surface or underground hydrologic connection to any other bodies of water, let alone rivers or lakes that traverse state lines.

Cattle ranching operations, especially small-scale operations, are often just one part of a ranch's total agribusiness operations, which can include timber and other crops. As a result, ranching operations can involve changes in land use. When such land alteration activities occur, cattlemen in California are increasingly encountering Corps personnel who assert permitting jurisdiction over these activities. This process is resulting in significant impacts on the members of the California Cattlemen's Association, including forcing them to abandon or change proposed land uses, delaying or halting economically necessary changes to their land uses, or forcing them to provide significant and costly mitigation. Because the "waters" in question are isolated, the primary grounds for jurisdiction invoked by the Corps is the migratory bird rule.

The California Cattlemen's Association believes that the Corps' assertion of jurisdiction over these private land uses

based upon the use by migratory birds of man-made watering holes or incidental swales extends the Corps jurisdiction beyond what was intended under either the Clean Water Act or the Constitution of the United States. The Association believes this Court should be aware of their members interests and cognizant of how the migratory bird rule is being applied in ruling on the merits of this case.

STATEMENT OF THE CASE

The Petitioner, Solid Waste Agency of Northern Cook County (SWANCC), is a municipal corporation made up of 23 different municipalities in Northern Cook County, Illinois. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (*SWANCC*). SWANCC was created by these municipalities to address, in a comprehensive way, the need for a safe and cost-effective means of disposing of nonhazardous waste generated by the communities within these municipalities. *Id.* at 847.

To this end, SWANCC purchased a 533-acre parcel intended to be utilized as a balefill site. *Id.* at 848. The parcel, however, had an assortment of trenches and depressions on it, reflecting the land's prior use as a strip mine. *Id.* These trenches, scattered throughout the site, make up a network of seasonal and permanent ponds. *Id.* SWANCC's original plans called for utilizing a 267-acre portion of the parcel. *Id.* Accordingly, in 1986, because the creation of the balefill site would require filling in these wet depressions, SWANCC contacted the Corps to determine whether a permit under Section 404 of the Clean Water Act was required. *Id.* The Corps inspected the site, and concluded that it had no jurisdiction. *Id.*

SWANCC, however, did not utilize its original plan but, instead, decided to proceed with a plan that would cover 414 acres of the site. *Id.* Accordingly, one year after the original inspection, SWANCC asked the Corps, again, whether

its new proposed balefill site contained any jurisdictional wetlands. *Id.* After another on-site inspection, the Corps responded in the negative. *Id.* According to the Corps, the waters on the site did not meet the regulatory definition of "wetlands." *Id.*

Shortly thereafter, however, the Illinois Nature Preserves Commission, a state agency, informed the Corps that migratory birds used the site. *Id.* As expressed by the court below, "[t]his new information made all the difference to the Corps, because of the so-called migratory bird rule." *Id.* That is, pursuant to its guidelines, the Corps asserted jurisdiction over the site because of the site's use by migratory birds. Under the agency's reckoning, migratory bird use satisfies the constitutional requirement that the federal government may only reach activities that substantially affect interstate commerce because people spend millions of dollars every year hunting and observing migratory birds. *Id.* at 850.

Based on the Corps' assertion of jurisdiction, SWANCC applied for a Section 404 permit. *Id.* at 849. The Corps denied it. *Id.* A revised permit application was also denied. *Id.* Subsequently, SWANCC filed this action in federal court challenging the Corps' jurisdiction. SWANCC contended that migratory bird use was insufficient to establish federal commerce jurisdiction over an isolated wetland. *Id.* The district court, following circuit precedent, ruled in favor of the Corps. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946, 951-52 (N.D. Ill. 1998) (*Solid Waste*). The Seventh Circuit Court of Appeals affirmed. *SWANCC*, 191 F.3d at 847. This Court granted SWANCC's petition for writ of certiorari to resolve whether the Corps' jurisdiction comports with the Clean Water Act and with the Commerce Clause. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 120 S. Ct. 2003 (2000).

SUMMARY OF ARGUMENT

The migratory bird rule is a jurisdictional rule employed by the Corps to reach isolated intrastate bodies of water under the Clean Water Act. The basic premise of the rule is that, regardless of the character, use, or origin of the body of water in question, the Corps may regulate it as a "water of the United States" solely based upon its use by migratory birds.

Because the rule does not attempt to define itself by reference to the statutory term "navigable waters . . . of the United States," the migratory bird rule is an unreasonable interpretation of the Corp's jurisdiction under the Act. By fashioning this extra-regulatory test to assert jurisdiction over land uses where connections to interstate commerce are, at best, extremely tenuous, the Corps has arrogated to itself the power to regulate virtually any land uses it chooses, and for reasons unrelated to the pollution control purposes which were the impetus behind the Clean Water Act. While Congress understood and intended that implementation of the Clean Water Act would serve broad environmental goals, the Corps may not use this broad intent to expand its jurisdiction beyond the specific terms set forth in the Act—to regulate the "navigable waters . . . of the United States."

The migratory bird rule is also unreasonable because it construes federal power beyond that allowed under the Commerce Clause. Use of waters by migratory birds does not make the filling of those waters an activity that "substantially affects" interstate commerce within the meaning of this Court's precedents. In particular, the use of the aggregation principle, by which the government determines "substantial effects" by aggregating activities that have minimal impacts on interstate commerce, does not apply to noneconomic activities. Further, the activity here—the filling of waters used by migratory birds—has such an attenuated link to any interstate commerce impacts that upholding the migratory bird rule as a valid

interpretation of the commerce power would be tantamount to sanctioning a federal police power without limits.

Finally, violations of the Clean Water Act carry with them significant penalties, both civil and criminal. Where the violation of a law has such significant impacts on individuals, it is unconscionable that the Corps may use vague jurisdictional grounds like the migratory bird rule to exercise permitting authority over private land use activities. By avoiding fixed and verifiable standards as the basis for its jurisdiction, the Corps has an almost unfettered ability to make unilateral decisions about its own jurisdiction, thereby subjecting landowners to arbitrary and discriminatory enforcement.

For these reasons, Amici respectfully submit that the migratory bird rule is invalid.

ARGUMENT

I

THE MIGRATORY BIRD RULE DOES NOT COMPORT WITH THE CLEAN WATER ACT BECAUSE IT IS AN UNREASONABLE INTERPRETATION OF THE TERMS "NAVIGABLE WATERS" AND "WATERS OF THE UNITED STATES"

A. The Migratory Bird Rule Allows the Corps to Exercise Jurisdiction over Virtually Any Waters Whatsoever

The Clean Water Act was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the means by which Congress sought to achieve this purpose was through regulating the discharge of pollutants into bodies of water. Consequently, under the Act, an individual must apply for a

permit, commonly referred to as a Section 404 permit, from the Army Corps of Engineers "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). The term "navigable waters" is defined by statute: "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

In 1985, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court addressed the question whether the statutory terms "navigable waters" and "waters of the United States" properly encompassed within them wetlands adjacent to navigable bodies of water and their tributaries. *Id.* at 123. In resolving that question in the affirmative, this Court specifically withheld expressing an opinion on whether the statute empowered the Corps to regulate wetlands not adjacent to open bodies of water—that is, isolated wetlands. *Id.* at 131 n.8. This case requires this Court to address the question left open in *Riverside Bayview*; specifically, whether the Corps' jurisdiction under the Clean Water Act extends to wetlands or other waters not connected to navigable bodies of water or their tributaries, and, more specifically, whether the Corps may do so under the so-called "migratory bird rule." In order to resolve that question, it is important to understand what the migratory bird rule is, and from where it derives.

Although the Assistant Solicitor General alluded to the migratory bird rule during oral argument in *United States v. Riverside Bayview Homes, Inc.*, No. 84-701, 1985 U.S. Trans. LEXIS 25, at *18-*19 (Oct. 16, 1985), the rule did not appear as an official Corps policy until 1986, when the Corps recodified its jurisdictional regulations in the Federal Register. *SWANCC*, 191 F.3d at 852. The gist of the rule, as cast by the court below, is that use of any water by migratory birds renders that water subject to federal regulation under the Commerce Clause because people spend millions of dollars every year hunting and observing migratory birds, including crossing state lines to do so, and that, therefore, destruction of bird habitat, in

the aggregate, "substantially affects" interstate commerce within the meaning of this Court's decision in *United States v. Lopez*. *SWANCC*, 191 F.3d at 850.

Technically, the migratory bird rule is not a "rule" at all, in that it has not been formally adopted as a regulation. *Id.* It has been found, instead, to be an "interpretive" guideline describing one means by which the Corps can assert jurisdiction under its "other waters" regulation. *Id.* *But see Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd without opinion*, 885 F.2d 866 (4th Cir. 1989) (finding that the migratory bird rule was a substantive rule, and that the Corps had violated the APA by promulgating it without complying with notice and comment requirements). The "other waters" regulation is one provision of the Corps' jurisdictional regulation, codified at 33 C.F.R. § 328.3. The "other waters" regulation purports to grant the Corps regulatory jurisdiction over:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

33 C.F.R. § 328.3(a)(3).

The regulation itself contains no language referencing the migratory bird rule. However, in the Federal Register notice announcing the rule, the Corps explained that the inclusion of any waters "which could affect interstate or foreign commerce" effected a broader reach than what appeared on the face of the regulation:

> EPA has clarified that waters of the United States at 40 C.F.R. 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,206, 41,217 (1986). Thus, the migratory bird rule does not limit itself to waters used by migratory birds, but to waters that potentially serve as habitat for birds or other wildlife, or that might be used for some other purpose that impacts interstate commerce.

In the Corps' 1988 revision to its rules, it further explained its jurisdiction under the migratory bird rule by citing to an internal memorandum from EPA's general counsel addressing the question of whether Clean Water Act jurisdiction required actual connections to interstate commerce, or were satisfied merely by potential use, including potential use by migratory birds or other wildlife. The memorandum stated:

> In simplified terms, the answer is that if the evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species,

> it is covered by EPA's regulation. . . . In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition . . . .

Memorandum from Francis S. Blake to Richard E. Sanderson of Sept. 12, 1985. Thus, despite the holding of the Court below that the regulation only reaches actual migratory bird habitat (that is, where a bird species "naturally lives or grows"), *SWANCC*, 191 F.3d at 850, the Corps construes its Clean Water Act jurisdiction more broadly. For example, in a case called *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), the EPA asserted Clean Water Act jurisdiction not on a finding that a sinkhole used by Laguna Gatuna for industrial wastewater served as bird habitat, but on the sole finding that dead migratory birds were found near the sinkhole. *Id.* at 565.

Further, the Corps is not limited by the "other waters" regulation to ponds or wetlands or any of the other categories of "waters" spelled out in its "other waters" regulation when asserting jurisdiction under the migratory bird rule. For example, in the present case, the Corps concluded that SWANCC's property did not contain wetlands, natural ponds, sloughs, prairie potholes, lakes or any of the "other waters" delineated in the regulation. The Corps had its own agents carry out on-site inspections on SWANCC's property on two separate occasions, and these agents specifically found that the man-made ditches on the property did not constitute "wetlands" within the Corps' *regulatory* definition of the term. *SWANCC*, 191 F.3d at 848. But the Corps found jurisdiction anyway, based upon the "catch-all" language of the "other waters" regulation, specifically, "[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). Thus, the

migratory bird rule is not simply a means by which the Corps asserts jurisdiction over instrastate wetlands, lakes, or other ecologically significant or natural bodies of water; rather, it is the jurisdictional test the Corps employs to reach waters of any nature. As the Corps explained in its 1986 Federal Register notice:

> For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." *However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."*
>
> (a) Non-tidal drainage and irrigation ditches excavated on dry land.
>
> (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
>
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. at 41,217 (emphasis added); *see also Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (upholding Corps' ability to exercise jurisdiction over artificially created waters used by migrating birds—in that case, salt crystallization pits—in accord with this language).

Thus, the "other waters" rule is just that—a regulation that purports to grant the Corps jurisdiction over any other water whatsoever, so long as the Corps can identify some link between that water and interstate commerce. Indeed, at oral argument in *Riverside Bayview*, when a member of this Court surmised that a man watering his back yard a lot would not be subject to the Clean Water Act, the Assistant Solicitor General responded:

> Unless we could show that he has got some interstate commerce activity going on in his back yard, and the Corps would take it upon itself to make that showing itself, and not require the back yard owner to come in and demonstrate it, the absence of the commerce connection to the Corps's satisfaction.

United States v. Riverside Bayview Homes, Inc., 1985 U.S. Trans. LEXIS 25, at *14.

As a result, the migratory bird rule, as an interpretation of the "other waters" regulation, allows the Corps to regulate *any type* of water—and all manner of local and private land uses—so long as the Corps can show that migratory birds use such waters. Given the fact that the United States is home to some 2.5 to 6 billion birds, two-thirds of which migrate, John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. Davis L. Rev.

1237, 1241 (1995), it is hard to imagine what waters the Corps cannot reach through the migratory bird rule.

B. "Navigable Waters" and "Waters of the United States" Cannot Reasonably Bear the Interpretation Given to These Terms by the Corps by Which Bird Use, Alone, Renders Waters "Waters of the United States"

As stated above, the Clean Water Act gives the Army Corps of Engineers permitting authority over discharges into the "navigable waters," defined by statute as "waters of the United States." 33 U.S.C. §§ 1344, 1362. The Petitioners have comprehensively argued that these terms were intended by Congress to relate to a specific category of waters. Moreover, even granting that these terms may be sufficiently ambiguous to allow some degree of agency interpretation, the Corps has patently failed to resolve the ambiguity in a manner that comports with the intent of the statutory language.

In *Riverside Bayview*, this Court held that the Clean Water Act was intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133. But it does not follow from this holding that the Corps may ignore the statutory language, and the intent behind it, in construing the scope of its jurisdiction and, further, that the Corps can regulate such waters for purposes unrelated to the overriding purpose of the Clean Water Act, which is to protect the Nation's waterways from the deleterious effects of pollution. *See* 33 U.S.C. § 1251(a)(1)-(7).

However, this is precisely how the Corp's jurisdiction has come to be understood. As the Seventh Circuit cast the issue, the statutory terms "navigable waters" and "waters of the United States" do not have any particular relevance in defining the scope of the Corps' jurisdiction. Instead, the Corps may simply "reach[] as many waters as the Commerce Clause allows," *SWANCC*, 191 F.3d at 851, and, further, may regulate

those waters for any purpose related to "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," *id.* at 852 (citing 33 U.S.C. § 1251(a)). Indeed, in this case, the Corps denied SWANCC's permit not because it would result in pollution of the nation's waterways, but based on the more amorphous "public interest" standards enunciated in 33 C.F.R. § 320.4, *see* Brief for the Petitioner at 9-10 (citing Administrative Record at 15,658-59), which includes the assessment of factors such as aesthetics, historical value, recreation, safety, food and fiber production, "considerations of property ownership and, in general, the needs and welfare of the people," in addition to considerations more apropos to environmental regulation. 33 C.F.R. § 320.4(a)(1). While one may not fault, in general, the agency's ability to exercise discretion in carrying out its statutory mandate to protect the interests that the Clean Water Act was enacted to remedy, it is another thing entirely to treat the broad interests enunciated in the preamble to the Act as defining the jurisdictional grant of authority to the Corps.

> A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. . . . The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (footnote omitted).

The Clean Water Act confers on the Corps the authority to regulate "navigable waters . . . of the United States"—and all that may imply—but not anything else. But here, the Corps has not given sufficient consideration to what Congress intended by its statutory language—or rather, has construed legislative intent from a selective reading of the legislative history.

However broad the term "waters" may be, the Corps cannot get around the underlying premise that,

> "Waters *of the United States*" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (emphasis in original). Indeed, the Fourth Circuit had little trouble in finding that the statutory language had to have some relevance in construing the reach of the Corps' authority. In striking down the Corps' "other waters" regulation as *ultra vires*, that court concluded:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters could affect interstate commerce. . . . When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997). In short, the Fourth Circuit held, consistent with the precept that courts must give effect to every word in a statute, *see* Norman J. Singer, Sutherland Statutory Construction, § 46:06 (2000); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), that the Corps was not free to define the statutory language any way it pleased in construing its own jurisdiction under the Act.

Even Congress, in acknowledging that the phrase "navigable waters of the United States" should "be given the

broadest constitutional interpretation," *Senate Consideration of the Report of the Conference Committee, October 4, 1972*, 93rd Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, Committee Print (January 1973) at 173, understood the term "waters of the United States" as having a distinct meaning:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact when the form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. *In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.*

Id. (emphasis added). *See also* Conference Report, House Debate, Committee Print (January 1973), at 250 (citation omitted) ("The 'gist of the Federal test' is the waterway's use 'as a highway,' not whether it is 'a part of a navigable interstate or international commercial highway.'"). Thus, the Corps' attempt to read the definitional phrase "waters of the United States" as being an open-ended license to define waters any way they chose is insupportable.

Indeed, in *Riverside Bayview*, this Court's holding that the Clean Water Act reached wetlands adjacent to navigable waterways was premised on the principle that the starting point for construing the Corps' jurisdiction was the notion that, though the Clean Water Act itself allowed the Corps to regulate waters that were not themselves navigable, the Act was directed

at the specified class of waters that were an appropriate focus of federal regulation. This Court reasoned:

> We cannot say that the Corps' conclusion that adjacent wetlands are *inseparably bound up with the "waters" of the United States*—based as it is on the Corps' and EPA's technical expertise—is unreasonable.

Riverside Bayview, 474 U.S. at 134. By stating the issue in this manner, this Court expressly acknowledged that the "adjacent wetlands" rule was based upon the notion that the "point at which water ends and land begins," *id.* at 132, is necessarily a technical one, and that therefore the Corps' expert determination that adjacent wetlands were "inseparably bound up" with the "waters of the United States" rendered adjacent wetlands, in fact, part of the "waters of the United States" subject to the Act.

But unlike the adjacent wetlands at issue in *Riverside Bayview*, there is no confusion on the point that the migratory bird rule reaches not only waters that are not "navigable in fact," but small, isolated waters like ponds or watering holes completely contained within a private parcel of land. Indeed, by definition, the migratory bird rule is employed precisely to reach those waters that the Corps cannot otherwise reach through its more traditional test of linking a given water body to an interstate waterway. *See United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1320 (6th Cir. 1974) (construing Clean Water Act to reach a creek that was a tributary of another creek that was a tributary of a river that was a tributary of a navigable river). Rather, the migratory bird rule is more typically used to reach an isolated puddle in the middle of a farmer's field. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 1999 U.S. Dist. LEXIS 21,389, at *43-44 (E.D. Cal. 1999).

Thus, while the term "waters of the United States" may be sufficiently ambiguous to allow the Corps some "wiggle" room in its interpretation, *see Riverside Bayview*, 474 U.S. at 133, there is no basis in law or in the statute that entitles the Corps to "wiggle" itself completely out of the fact that "waters *of* the United States" is a subset of all the waters *in* the United States. Through the migratory bird rule, the Corps has "bootstrap[ped] itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Both law and logic preclude the Corps from construing the term "navigable waters . . . of the United States" to reach any waters, so long as those waters are used or could be used by migratory birds. Accordingly, this Court should find that the migratory bird rule is an unreasonable interpretation of the term "waters of the United States" in the text of the Clean Water Act.

II

THE MIGRATORY BIRD RULE IS UNREASONABLE BECAUSE IT STRETCHES FEDERAL AUTHORITY FAR BEYOND THAT ALLOWED UNDER THE COMMERCE CLAUSE

As this Court stated in *United States v. Lopez*, 514 U.S. 549 (1995), "[t]he Constitution creates a Federal Government of enumerated powers," *id.* at 552, and one of those powers is the power "to regulate commerce . . . among the several states." U.S. Const. art. I, § 8. In this case, the United States contends that the power to regulate interstate commerce encompasses within it the power to regulate isolated, instrastate bodies of water that are used by migratory birds. This is an unreasonable interpretation of the Act.

> A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.

United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1915). Because the rule, both on its face and as applied, gives rise to serious doubts as to whether the Corps is exercising its permitting authority consistent with the limits of federal power, this Court should hold the migratory bird rule invalid.

Even were this Court to construe the rule as though it were duly enacted by Congress, it is constitutionally troublesome. *See Wilson*, 133 F.3d at 257. At first blush, and perhaps the second and third, the connection between interstate commerce and the use of ponds by birds does not readily come to mind. However, the Army Corps of Engineers, with the sanction of several courts of appeals, *SWANCC*, 191 F.3d 845; *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), has ingeniously devised a connection that, it argues, supplies the requisite nexus between birds and commerce. As explained by the court below:

> "[T]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds." Statistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons. There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds

> "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

SWANCC, 191 F.3d at 850 (citations omitted). Thus, according to the Seventh Circuit and the Corps, the migratory bird rule satisfies the third *Lopez* test—that is, it is a regulation of an activity that substantially affects interstate commerce—because destruction of its habitat, in the aggregate, substantially affects interstate commerce related to the hunting and observing of migratory birds. *SWANCC*, 191 F.3d at 849-50.

While the Seventh Circuit drew its conclusion with the benefit of this Court's analysis in *Lopez*, the court misapplied it. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari). More critically, it misapplied it in a context—through aggregation—which this Court has further clarified through its subsequent decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000).

In *United States v. Lopez*, this Court struck the Gun Free School Zones Act as beyond the authority of Congress to enact under the Commerce Clause. *Lopez*, 514 U.S. at 552. In so doing, this Court noted that the act could not

> be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. Nevertheless, the court below found it sufficient that the destruction of bird habitat, in the aggregate, was sufficient to create the "substantial effects" necessary to uphold the migratory bird rule. *SWANCC*, 191 F.3d at 850.

However, in *Morrison*, this Court affirmed that the aggregation principle may not be invoked to sanction congressional action every time Congress chooses to regulate intrastate noneconomic activity. *Morrison* dealt with the constitutionality of the federal Violence Against Women Act. The provision in question gave private litigants the right to bring a federal claim against any individual who committed a "crime of violence motivated by gender." *Morrison*, 120 S. Ct. at 1747. In defending the constitutionality of the Act from a Commerce Clause challenge, the government argued that the Act regulated an activity that "substantially affected" interstate commerce because violence against women, in the aggregate, had significant effects on the economy in terms of time lost from jobs, medical costs, and other impacts. *Id.* at 1752. The Court rejected the notion that the aggregation of isolated activities was automatically sufficient to meet the requisite "substantial effects" test:

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history *our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.*

Id. at 1751 (emphasis added). Here, the Corps is regulating the fill of waters, an activity that is not, by its nature, economic. Viewed in light of *Morrison's* holding, because the destruction of waters is not inherently economic, the aggregation principle does not protect the rule.

Thus, the rule is only valid if it meets the other "substantial effects" tests, such as if the rule contains a jurisdictional element requiring that the destruction of a particular water would have impacts on interstate commerce, *Lopez*, 514 U.S. at 561, or could otherwise be sustained under

an independent analysis of substantial effects, *id.* at 562. But, again, the migratory bird rule fails.

First, the rule contains no jurisdictional element in the sense intended by *Lopez*. That is, though bird use is the "jurisdictional element" employed by the Corps, even where migratory birds in fact use a given body of water, the Corps' rule does not require any showing that the destruction of the water would impact the identified commerce in migratory bird hunting or observing. Second, under an independent analysis, this Court made it clear that a Commerce Clause rationale may not employ a method of reasoning which would admit of no limits on the commerce power. *Morrison*, 120 S. Ct. at 1752. Specifically, this Court held that the commerce power did not allow the federal government to regulate any activity, such as violence against women, that could be linked through a long causal chain to indirect and unspecified effects on interstate commerce, such as impacts on jobs and medical costs. Because virtually all human activity has similar, though attenuated, impacts on commerce, such a line of reasoning would effectively grant Congress unlimited authority to regulate any human activity, and "completely obliterate the Constitution's distinction between national and local authority." *Id.*

Like the link between violence and commerce espoused in the Violence Against Women Act, the Corps' theory of a link between interstate commerce in hunting and birdwatching and the destruction of bird habitat proves too much. *See Lopez*, 514 U.S. at 564. In *Morrison*, the regulation in question targeted only "gender-motivated" violence; consequently, there was no direct correlation between the specific regulated conduct and the supposed commerce impacts. As this Court noted, all violence, of whatever nature, had even greater impacts on the economy than the subset of violence that constitutes gender-motivated violence. *Morrison*, 120 S. Ct. at 1753. Thus, this Court reasoned, if Congress could regulate gender-motivated

violence, it could regulate all murder and all crime—a power that went far beyond what the Commerce Clause permitted. *Id.*

Similarly, any impacts on the commerce in bird hunting and watching do not directly correlate to the destruction of waters that are regulated under the migratory bird rule. If the Corps may regulate "waters" simply because they may be used by migratory birds, the Corps line of reasoning would enable Congress to regulate any land or object that is used by any animal at all, since the ownership, breeding, sale, observation, hunting, and studying of all animals surely has an even greater effect on interstate commerce than the mere use of isolated ponds by migratory birds. In short, the rationale employed by the Corps in invoking the migratory bird rule admits of no limits on the federal commerce power.

Because the migratory bird rule expands federal authority beyond that granted to the federal government under the Commerce Clause, it is an unreasonable interpretation of what Congress intended when it granted the Corps authority to regulate the "navigable waters . . . of the United States." Accordingly, this Court should hold the migratory bird rule invalid.

III

BECAUSE CLEAN WATER ACT VIOLATIONS CAN RESULT IN SIGNIFICANT PENALTIES, IT IS UNREASONABLE TO ALLOW THE CORPS TO EMPLOY THE MIGRATORY BIRD RULE TO SELECTIVELY REGULATE WHATEVER LAND USES IT DEEMS UNDESIRABLE

Violations of the Clean Water Act carry with them substantial penalties, including criminal penalties that can entail confinement and significant fines. 33 U.S.C. § 1319. And because the Act makes it unlawful to "discharge . . . dredged or fill material into the navigable waters" without a permit, 33 U.S.C. § 1344(a), criminality depends as much upon the

overt act of filling as it does on the character of the water or land in question—specifically, whether any portion of the property constitutes "waters of the United States." Consequently, it is critical that the statutory term "waters of the United States" bears a meaning that permits the Corps to reach the types of activities and individuals Congress intended to reach.

But the migratory bird rule allows the Corps to reach such a broad array of properties and waters that it is affirmatively *unhelpful* in enabling an individual to make a definitive determination as to whether or not any land he or she may own contains "waters" subject to the Corps' permitting jurisdiction. In short, the migratory bird rule, by allowing the Corps to reach not only significant waters such as lakes and rivers, but man-made ditches, *SWANCC*, 191 F.3d at 848, and abandoned pits created for industrial use, *Leslie Salt*, 896 F.2d at 359-60, even where those waters do not constitute "wetlands" within the regulatory definition of that term, *SWANCC*, 191 F.3d at 848, is an interpretation that "contains no such definite standard from which one can start in the calculation of his duty." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (Jackson, J., dissenting).

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The migratory bird rule is just the type of amorphous rule that raises serious due process problems. It allows the Corps to reach *any type* of waters solely on the basis that those waters *could be used* by migratory birds. Accordingly, because migratory birds are ubiquitous, *see* Leman, *supra*, the migratory bird rule enables the Corps to assert jurisdiction over property subject only to the subjective judgment of individual agency officials as to what lands ought or ought not to be regulated.

The purpose of rules is to ensure fair, consistent, and objective standards that enable the regulated community to understand what the law requires. *See generally*, Kenneth Culp Davis, Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (Third Ed. 1994). But rules, even unenacted ones like the migratory bird rule, are useless if they do not serve these ends. Indeed, given the Corps' expansive understanding of the waters it may regulate under the migratory bird rule, the Corps' other jurisdictional regulations relating to the definition of terms like "wetlands," 33 C.F.R. § 328(b), "tidal waters," 33 C.F.R. § 328(f) and "navigable waters" 33 C.F.R. § 329.4, for purposes of Section 404 jurisdiction, are manifestly pointless. If a landowner hires the nation's foremost hydrologists and biologists to survey the soils and flora on his property and they conclude that the property contains no wetlands, the entire exercise can be summarily negated by the predilections of a single bird that decides to have a bath. In the end, there is no avoiding the fact that, under the regime of the migratory bird rule, whether one is breaking the law depends entirely upon whether birds have, or could have, used one's property. This is a bizarre ground on which to base criminal or civil liability.

But more pragmatically, the expansive notion of jurisdiction evidenced by the migratory bird rule—that is, that any type of water at all may be regulated by the Corps—leaves the regulated community in the dark as to whether a given assertion of jurisdiction by the Corps is legitimate. As a result,

every assertion of jurisdiction must be taken as valid by landowners, because there is no verifiable standard against which they may measure legitimate versus illegitimate enforcement.

In practice, it is not unusual for landowners to receive informal "notices," informing them, with no specificity whatsoever, that the land they are developing "may" contain waters subject to Section 404 permitting jurisdiction, and that the unlawful filling of these waters can subject them to heavy fines or penalties. *See* Notice at Appendix "A." Once confronted by such a notice, landowners are unavoidably bound up in the permitting scheme, solely at the Corps' discretion. Thus, once the Corps asserts jurisdiction, a party must either risk civil or criminal prosecution, or submit to regulation. *See Laguna Gatuna*, 58 F.3d at 566. Because "potential" bird use is enough to create Corps' jurisdiction, the individual being regulated is subject entirely to the Corps' unilateral judgment as to the characterization of his land as "waters of the United States."

For example, in *Howell v. United States Army Corps of Engineers*, 794 F. Supp. 1072 (D.N.M. 1992), a plaintiff who had received a cease and desist order from the Corps challenged the assertion of jurisdiction over his property in a declaratory relief action, claiming that his land did not contain any wetlands subject to the Clean Water Act. *Id.* at 1074. In accord with settled law, the Court dismissed the case for lack of subject matter jurisdiction. *Id.* But the Court's analysis is revealing of how inherently open to abuse the Corps' regulatory process is. A letter from the Corps to the plaintiff stated:

> *We intend to conduct a wetland delineation on your property to determine in detail the extent of wetlands* initially investigated by Mr. Wood. . . .
>
> When all of the available information has been reviewed *and our wetland delineation has been*

> *completed and verified*, I will request you to apply for an after-the-fact permit . . . .

Id. at 1074 (emphasis added). In short, the Corps' issued its cease and desist order despite its admission that it had no clear knowledge of the existence or extent of wetlands on the property in question. The Court, in finding no provision in the Clean Water Act for pre-enforcement judicial review, displayed remarkable irony in concluding:

> It is clear from the cease-and-desist letter quoted above that the Corps will not finalize its decision until it conducts its "wetland delineation" and decides whether to issue a permit. *Only at that time, and perhaps not until the Corps forces compliance through penalties or judicial action, will the plaintiff know the concrete effects of the Corps' decision.*

Id. at 1074-75 (citation omitted) (emphasis added). As explained by the court, the plaintiff landowner had no recourse to judicial review of the Corps' initial unsubstantiated assertion of jurisdiction. *See also Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993). Further, whether or not his land contained "wetlands" depended solely upon what the Corps itself concluded—after-the-fact, and only by means of forcing the landowner to submit to an on-site inspection of his land by government agents: "The issue concerns factual determinations properly resolved *through agency expertise* and reviewable by this Court once a record is developed *by the agency*." *Id.* at 1075 (emphasis added). *See also United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979):

> In the course of obtaining the permit he can extract from the Corps an exact statement of where the wetlands are and protect himself from further legal proceedings. Furthermore, Byrd cannot complain of the absence of a legal description of the wetlands

> since, as the district court noted, he has refused to permit his land to be surveyed.

Id. at 1209. In short, the Corps gets to call all the shots.

This degree of regulatory power, coupled with an amorphous definition of "waters of the United States" that allows a Corps agent to legitimize the Corps' authority simply by finding that a pond "would be" used by a bird gives the Corps complete discretion to decide, unilaterally, whether a given land use activity may or may not be lawful. *See Borden Ranch*, 19 U.S. Dist. LEXIS 21,389 at *43-44 (Court agreed with Corps that a vernal pool "was or would have been inhabited" by a threatened species; therefore, the destruction of the pond affected interstate commerce.). This is an open invitation to arbitrary and discriminatory enforcement.

As a practical matter, the mere assertion of jurisdiction by the Corps becomes jurisdiction as a matter of law, because such decisions are not immediately reviewable and because the Corps is capable, through its standardless migratory bird rule, of establishing jurisdiction under the most marginal rationales which no prudent landowner can, at present, ignore at the risk of criminal or civil liability. When an administrative agency, such as the Corps, "holds all the cards" as to the implementation of a regulatory permitting program, due process demands, first, that the agency exercise only that power granted to it, and second, that it define the elements of an offense with sufficient specificity to put the public on notice. The Corps' refusal to define "waters of the United States" by reference to objective standards makes regulatory abuse not merely a possibility, but virtually guaranteed, since Corps personnel themselves are not bound by consistent rules.

Where a federal law, such as the Clean Water Act, can subject individuals to criminal and civil penalties, *see* 33 U.S.C. § 1319, it is unconscionable that a federal agency is able to implement the law in a manner that has no objective, verifiable

standards by which an individual can discern the requirements of the law. In the Clean Water Act, which has been held by some courts to be a "public welfare" statute in which violations can be criminally prosecuted in the absence of any criminal intent, *see United States v. Hanousek*, 176 F.3d. 1116 (9th Cir. 1999), *see also* 33 U.S.C. § 1319(c)(1), the possibility of arbitrary or discriminatory enforcement demands that the terms of the law be defined with a high degree of specificity.

Because liability is not merely predicated upon the overt act of filling, but on the character of the land which is being filled, it is unreasonable to sanction a definition of "waters of the United States" which bears only what meaning the Corps chooses to assign to it, and, in particular, which depends upon whether a bird uses it. The migratory bird rule is an unreasonable interpretation of the term "waters of the United States" because it is patently unreasonable to predicate criminal and civil liability upon a Corps official's subjective calculation of where a bird may choose to alight.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the decision of the court below should be REVERSED.

DATED: July, 2000.

Respectfully submitted,

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REPLY TO
ATTENTION OF

NOTICE

The Corps of Engineers' employee delivering this notice believes your construction activities are in violation of Federal Law.

Anyone engaged in any construction activity in a waterway of the United States or adjacent wetlands must secure a Department of the Army permit before construction is initiated. If you are engaged in such construction activity, and do not have a permit, you are violating Federal Law and are subject to fines up to $50,000.00 per day of construction activity, depending on the nature of the activity. Any contractor performing work in waters of the United States or adjacent wetlands without a permit is subject to the same penalties as the landowner for whom the work is being performed.

Should you currently be engaged in unauthorized work, we recommend that you cease work. Cessation of work is an indication of a good faith attempt to comply with the law. In any event, a formal cease and desist order will be promptly issued to anyone engaged in illegal work.

If you have any questions which the employee delivering this notice cannot answer, please contact one of the following Regulatory Offices, or our Office of Counsel (916) 557-5290.

Appendix A-2

California and Nevada	Sacramento District, Corps of Engineers Regulatory Section 1325 J Street Sacramento, CA 95814-2922 Phone (916) 557-5250
Utah	Sacramento District, Corps of Engineers Utah Regulatory Office 1403 South 600 West, Suite A Bountiful, Utah 84010 Phone (801) 295-8380
Western Colorado	Sacramento District, Corps of Engineers Grand Junction Regulatory Office 400 Rood Avenue, Room 142 Grand Junction, Colorado 81501-2563 Phone: (303) 243-1199

/s/ Laurence R. Sadoff
LAURENCE R. SADOFF
Colonel, CE
District Engineer

1. Section 404, Clean Water Act (33 USC 1344)